IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

MONDAY, THE 1ST OCTOBER 2007 / 9TH ASWINA 1929

WP(C).No. 27175 of 2007(I)

PETITIONER:

M/S.H & R JOHNSON (INDIA) LTD.,
XLI/2261, PARAMARA TEMPLE ROAD,
ERNAKULAM NORTH
REPRESENTED BY IT'S BRANCH MANAGER,
SRI.UNNIKRISHNAN.

BY ADV. SMT.K.LATHA

RESPONDENTS:

1. THE STATE OF KERALA, REPRESENTED BY CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.

2. COMMISSIONER, COMMERCIAL TAXES, THIRUVANANTHAPURAM.

3. THE ADDL.SALES TAX OFFICER-I, COMMERCIAL TAXES, KASARAGOD.

BY GOVERNMENT PLEADER SRI.NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17/09/2007, THE COURT ON 01.10.2007 DELIVERED THE FOLLOWING:

V.GIRI, J.

W.P.(C).No.27175 of 2007 H

Dated this the 1st day of October, 2007.

JUDGMENT

The petitioner, who is a dealer in tiles, registered with the Assistant Commissioner (Assessment) No.III, Special Circle, Ernakulam, challenges an order of assessment passed under Section 30 B of the Kerala General Sales Tax Act (for short '**the Act'**) as also an order of penalty under Section 45 A of the said Act, as affirmed by the appellate authority and the revisional authority. The transaction which led to the passing of an order under Section 30 B, as well as imposition of penalty under Section 45 A, consisted of the petitioner transporting ceramic glass tiles worth Rs.1,98,328/- from Dewas to Mahe to the border check post at Manjeshwar on 5.2.2002, after obtaining a transit pass in form No.27 C for transport of the same to Mahe. The goods were consigned by M/s.H & R Johnson (India) Limited, Dewas to M/s.Plaza Sales Corporation, Mahe. Since transit across border check post requires a transit pass, according to the petitioner, such transit pass had been obtained as per Section 30 B of the Act. The

transit pass in the prescribed form will have to be obtained when a vehicle or a vessel carrying goods from any place outside the State, passes through the State, in the case of its destination being situated outside the State. While doing so, the owner or driver or a person in charge of such vehicles should deliver it to the officer-in-charge of the last check post before its exit from the State. Insofar as the consignment, in question, is concerned, though a transit pass was apparently obtained for the purpose of enabling the consignment to pass through the State at Manjeshwar, the said transit pass was not surrendered at the exit check post. In the circumstances, the 4th respondent proposed to assess the value of the ceramic tiles as disclosed in invoice viz., at Rs.1,98,328/- plus Rs.40,000/- towards freight and 15% towards profit, aggregating Rs.2,74,080/- to sales tax under Section 30B of the Act at 12% with additional sales tax of 15% thereon. The proposal was communicated to the assessee on 12.12.2003. In response to the notice the assessee-the consignor and the consignee-M/s.Plaza Sales Corporation gave a reply to the effect that the goods were

accounted by the consignee, M/s.Plaza Sales Corporation at Mahe and that there can be no presumption of sale within the State. The assessing authority took note of the fact that there is no authentication regarding passage of the goods, through the sales tax check post, Mahe or any other check post placed along the border between the State and Mahe. The assessing authority, therefore, inferred that the goods which had entered the State of Kerala through the sales tax check post at Manjeshwar had not been transported to Mahe. In other words, there was no material to conclude that the State of Kerala was only a transit point for the passage of goods from outside the State for ultimate delivery within Mahe. As a consequence, the assessing authority came to the conclusion that the goods should be presumed to have been sold within the State. Accordingly a taxable turn over of Rs.2,74,080/- was assessed to sales tax at 12%. Ext.P4 is the order of assessment in that regard. Since there was an attempt at evasion of tax, penalty under Section 45 A of the act was also imposed as per Ext.P3.

2. Revision petitions were preferred against Exts.P3 and P4 before the Deputy Commissioner. The Deputy Commissioner proceeded to note that the petitioner had consigned 700 cartons of ceramic tiles to M/s.Plaza Sales Corporation under their invoice No.008209/01-02 dated 31.10.2002 and the driver of the vehicle had obtained transit pass from the entry check post at Manjeshwar. It is practically admitted that the transit pass was not surrendered at the last check post, before the vehicle crossed the border of the State into Mahe. Section 30B contemplates a statutory presumption, that all goods which apparently are transported from the State to a destination outside the State, using the State only as transit point, were actually sold in the State, if the transit pass, which was obtained at the time of entry of the goods into the State, was not surrendered at the last check post before they exit from the State. The said statutory presumption will have to be given effect to. The first revisional authority also took note of the fact that the assessee had not produced the original of the invoice bearing a check post seal either

before the assessing authority or before the revisional authority to prove that the goods had been moved outside the State. In the circumstances, the first revisional authority came to the conclusion that the order of assessment and the order imposing penalty is justified.

3. Ext.P5 was challenged in revision before the Commissioner of Commercial Taxes vide Exts.P6 and P7. The Commissioner concurred with the authorities below and dismissed the revision as per Ext.P8 order. Exts.P3, P4, P5 and P8 are under challenge in this writ petition.

4. Learned counsel for the petitioner contended that the failure to surrender the transit pass obtained from the check post at Manjeshwar at the border check post at Mahe is that of the driver. There cannot be any irrebuttable presumption under Section 30B of the Act that, if the transit pass was not surrendered at the last exit point in the State, the goods could have been sold within the State. M/s.Plaza Sales Corporation-the consignee had responded to the notice issued by the 4th respondent and had affirmed that the goods had been delivered to them; that they had

purchased the same from the petitioner and that consequently the authorities should have accepted the version of the assessee; that the goods had actually passed through the State as a transit point. If there is other evidence to show that the goods, which had originated from outside the State, had actually been delivered at a point outside the State, then the presumption, raised under Section 30 B of the Act solely on the basis of the failure to surrender the transit pass at the last exit point in the State, stands rebutted. Learned counsel further contended that insofar as the imposition of penalty is concerned, the same should not have been treated as automatic. The principle, that penalty under Section 45 A of the Act would be imposed only when there is proof of willful conduct on the part of the assessee, has not been kept in mind either by the original authority or by the revisional authority. Learned counsel, therefore, prayed that the orders under challenge be set aside.

5. Learned Government Pleader contended that Section 30B of the Act provides for a statutory presumption,

arising out of the failure on the part of the transporter of goods to surrender the transit pass at the last exit point prior to leaving the State. The statutory presumption has not been rebutted by any other overwhelming evidence to the contrary. There was failure on the part of the assessee to produce an invoice with the seal of the check post either before the original authority or before the first revisional authority. Such evidence, had it been produced, could have been taken note of by the assessing authority to find out whether the goods which actually originated from outside the State had really left the State and had been delivered only at Mahe. The statutory presumption, therefore, was not rebutted. The authorities had, therefore, exercised their jurisdiction legally and properly. The levy of penalty under Section 30 B (iii) is also justified in the present case.

5. I have considered the contentions of the learned counsel for the petitioner as also the learned Government Pleader.

6. It is significant to note that the petitioner admitted certain facts, before the assessing authority.

Firstly, the goods in question were consigned by the petitioner from outside the State. Secondly, the goods had actually entered the State through the check post at Manjeshwar. Thirdly, according to the petitioner, the goods had left the State to be delivered at Mahe. Once these three facts are admitted, then Section 30B of the Act applies *ipso facto*. Thus, a transit pass had to be obtained in the prescribed form for such goods from the officer-in-charge of the first check post prior to its entry into the state. According to the petitioner, a transit pass had been obtained. Once the consignment reaches the State, then the statute obliges the owner of the goods or the person in charge of the same to surrender the transit pass at the last check post before exit from the State. It is admitted by the petitioner that there is absolutely no material to indicate that the transit pass had been surrendered at the last exit point in the State.

7. The assessing authority considered the issue as to whether there is any evidence to show transportation of the goods to a place outside the State after its entry into

the State. It was noted that the photo copy of the sale bill stated to have been issued by the petitioner, produced by M/s.Plaza Sales Corporation also did not contain any authentication of the sales tax check post at Mahe. Thus, it was a case of failure on the part of the assessee to produce any other evidence to rebut the statutory presumption provided for under Section 30B of the Act.

8. The first revisional authority also noted this failure on the part of the assessee and observed as follows:

> **"The petitioner has not produced the original of the invoice bearing check post seal either before the assessing authority or before me in revision to prove that the goods have been moved out of the State. Hence the evidences produced are not sufficient enough to conclude that the consignment had actually moved out of the State."**

9. The Commissioner of Commercial Taxes also correctly noted that there is failure on the part of the petitioner to discharge the onus of proving that the goods, after entry into the State, left the State for delivery at a point outside the State. I find that the assessing authority and the revisional authority have correctly applied the

provisions of law. The order of assessment under Section 30B of the Act is warranted in terms of the provisions of the statute. The order imposing the penalty also seems to be warranted, in terms of Section 30B(iii) of the Act. No tenable explanation is offered by the petitioner either for failure to surrender the transit pass at the check post at Mahe or in relation to the absence of any check post seal even on the original of the invoice issued by the consignor and accompanying the goods.

In the result, the orders under challenge do not suffer from any infirmity in law or in fact. There is no illegal or irregular exercise of jurisdiction by the statutory authorities. The writ petition is bereft of merits and the same is accordingly dismissed.

Sd/-

(V.GIRI)

JUDGE

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